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of the telegram, might have received, had the telegram been properly delivered, was dependent upon some act to be performed by a third person.⁸ In such cases it is a matter of fact as to whether the third party would have so acted as to benefit the plaintiff; and his testimony is admissible as evidence.⁹ It is submitted that this is the proper attitude, that the law should favor the innocent party and not be too lenient with the wrongdoer as the defendant in the principal case admittedly is.

M. W.

EMINENT DOMAIN: LIABILITY FOR VALUE OF FIXTURES PLACED ON LAND BY A TRESPASSER IN SUBSEQUENT CONDEMNATION PROCEEDINGS.—A landowner is entitled to the value of any fixtures placed on his land by a trespasser. The reasons given are that the latter in annexing his chattels to the soil presumably intended to use them as part of the land, and that he cannot reclaim them without committing another trespass. Regardless of his good faith he cannot recover the fixtures or their value, though a bona fide disseisor may set off the value of beneficial improvements if sued by the owner for mesne profits.¹ But when a railroad, or other body endowed with the power of eminent domain, tortiously enters on the land of another, lays tracks, or places other fixtures on the land, an exception to the above rule is allowed to the extent of holding the landowner entitled to recover only the value of the land actually taken, without considering the value added by the improvements if the trespasser resorts to condemnation proceedings to obtain title to the property. This rule is established by a great weight of authority, and is followed in *Atchison, Topeka & Santa Fe Railway Company v. Richter*.² New York, and a few other jurisdictions hold that the trespasser loses his property in the fixtures and is bound to pay their value in the condemnation proceedings.³ California recognizes the prevailing view, at least where the trespass is unaccompanied by force,⁴ although one case holds that where entry is forcibly made

⁸ *Western Union Tel. Co. v. Caldwell* (1907), 126 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 749; *Kerns v. Western Union Tel. Co.* (Mo., 1913), 160 S. W. 556; *Cain v. Western Union Tel. Co.* (1913), 89 Kans. 797, 133 Pac. 874.

⁹ *Elam v. Western Union Tel. Co.* (1905), 113 Mo. App. 538, 88 S. W. 115; *Carter v. Western Union Tel. Co.* (1906), 141 N. C. 374, 54 S. E. 274; *Western Union Tel. Co. v. Sights* (1912), 34 Okla. 461, 126 Pac. 234.

¹ *Ewell on Fixtures*, 2d ed., p. 79.

² (N. Mex., Jan. 12, 1915), 148 Pac. 478. Rehearing denied March 10, 1915. See also *Ewell on Fixtures*, 2d ed., pp. 88-90; *Lewis on Eminent Domain*, 3d ed., § 759, and cases there cited.

³ *Village of St. Johnsville v. Smith* (1906), 184 N. Y. 341, 77 N. E. 617, 5 L. R. A. (N. S.) 922, 6 Ann. Cas. 379. See also cases cited in *Lewis on Eminent Domain*, 3d ed., § 759.

⁴ *Cal. P. R. R. Co. v. Armstrong* (1873), 46 Cal. 85.

against the objections of the landowner the trespasser becomes bound to pay the value of the improvements in subsequent condemnation proceedings.⁵ The distinction has not been followed elsewhere and is expressly disapproved in the principal case. The Supreme Court of California also has indicated its willingness to overrule *United States v. Land in Monterey County* in so far as it conflicts with the prevailing doctrine.⁶ Since the landowner can recover full damages for the trespass, there seems to be no reason for the distinction, as it amounts practically to a forfeiture of the property by way of punitive damages.

The rule of the principal case appears to involve an extension of the doctrine of trade fixtures to cases where there is neither a landlord and tenant relationship nor any agreement between the parties. While it is difficult to find the exact grounds on which to justify the doctrine, it is one which is entirely fair to the parties and is a sensible way of disposing of the matter. The landowner has expended nothing on the fixtures, they are usually useless to him until severed and they were not intended for use in connection with the land. The trespasser desires only an easement over the land, and intended the improvements to be dedicated to use in connection with such easement and as part of an extended plant. He has also the power to obtain the property by taking the proper proceedings. In so far as his failure to do so before entry on the land has injured the landowner, the latter can recover in ejectment, trespass or an action for the use and occupation of the land.⁷ As the landowner is entitled only to "just compensation" in condemnation proceedings, why should the public utility be forced to pay twice for the property which it has prematurely affixed to the land?

A closer question is presented when the improvements affixed by the trespasser are, as in the case of a shed or warehouse, capable of use in connection with the land itself, independently of any easement. In such a case it would appear that they were intended for use in connection with the land, rather than with the easement of way, and that they become "fixtures" in the strict sense, and, therefore, that the landowner is entitled to be paid their value in the condemnation proceedings.

J. S. M., Jr.

EVIDENCE: CONFIDENTIAL COMMUNICATIONS: ATTORNEY AND CLIENT.—That an attorney cannot without the consent of his client be examined as to any communications made by the client to him in the course of professional employment is a privilege that has been strongly denounced.¹ In favor of the privilege it

⁵ *United States v. Land in Monterey Co.* (1874), 47 Cal. 515.

⁶ *Albion River R. R. Co. v. Hesser* (1890), 84 Cal. 435, 24 Pac. 288.

⁷ *Justice v. Nesquehoning Valley R. R. Co.* (1878), 87 Pa. St. 28.

¹ Appleton on Rules of Evidence, ch. X., following Bentham.